

GCB 1459
SR 529, Ebey Slough Bridge Replacement
Environmental Mitigation Work by Snohomish County at Smith Island

This Agreement for Environmental Mitigation (this "Agreement") is made and entered into between the Washington State Department of Transportation, hereinafter the "STATE," and Snohomish County, a political subdivision of the State of Washington, hereinafter the "COUNTY," together referred to as the "Parties" and individually as the "Party."

WHEREAS, the STATE has replaced the SR 529 swing-span bridge over Ebey Slough, Snohomish River known as the Ebey Slough Bridge Replacement project, herein the "STATE Project," in the City of Marysville and in unincorporated Snohomish County, Washington, to meet seismic standards and anticipated traffic capacity; and

WHEREAS, the STATE Project had unavoidable impacts on certain wetlands and streams under the jurisdictions of the: U.S. Army Corps of Engineers (the "Corps") and the Washington State Department of Ecology ("Ecology") pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456; Snohomish County under the Shoreline Management Act, Chapter 90.58 RCW; and the Washington State Department of Fish and Wildlife ("WDFW") under the Hydraulics Code, Chapter 77.55 RCW; (hereinafter, collectively, the "Regulatory Agencies"); and

WHEREAS, the STATE obtained from the Regulatory Agencies the necessary permits (the "STATE Permits") to construct the STATE Project on the condition that STATE would provide appropriate mitigation to compensate for the STATE Project's impacts on wetlands and streams; and

WHEREAS, pursuant to the STATE Permits, the STATE has certain obligations to the Regulatory Agencies to monitor and report findings regarding the mitigation requirements; and

WHEREAS, the COUNTY has an upcoming restoration project in this area called Smith Island Restoration Project (hereinafter the "Smith Island Project"), which would restore 300-400 acres of estuarine tidal marshlands in the Snohomish River Estuary, WRIA 7, as shown on Exhibit A; and

WHEREAS, an opportunity exists for the COUNTY to provide a tidal site in conjunction with the Smith Island Project ("Mitigation Work") to the STATE as shown on Exhibit A; and

WHEREAS, the COUNTY has coordinated and participated in numerous wetland and stream restoration, mitigation and/or improvement projects in the past; and

WHEREAS, it is deemed to be in the public's best interest that the COUNTY perform the Mitigation Work as part of the Smith Island Project; and

WHEREAS, the COUNTY is willing to perform the STATE's Mitigation Work in conjunction with the Smith Island Project, subject to the terms and conditions herein; and

WHEREAS, the STATE and COUNTY have negotiated a lump sum amount as compensation for the Mitigation Work as detailed herein; and

WHEREAS, the Parties acknowledge and agree that notwithstanding the COUNTY's obligation under this Agreement to perform the Mitigation Work, any failure of the COUNTY to fully perform the Mitigation Work due to circumstance beyond the COUNTY's control, the STATE remains obligated to perform the Required Mitigation as a condition of having received the STATE Permits; and

WHEREAS, the COUNTY does not have sufficient funding to absorb the cost of the Mitigation Work without a portion of the lump sum amount being paid in advance. The STATE is willing to provide such advance payment as further described herein; and

WHEREAS, pursuant to RCW 47.28.140, the STATE and the COUNTY are authorized to enter into this Agreement, and the COUNTY is likewise authorized under its charter, the Snohomish County Code, and related policies to enter into this Agreement.

NOW, THEREFORE, pursuant to the above recitals that are incorporated herein as if set forth below, and in consideration of the terms, conditions, covenants, and performances contained herein, and in the attached Exhibit A which is incorporated and made part hereof by this reference,

THE PARTIES MUTUALLY AGREE AS FOLLOWS:

1. DESCRIPTION OF THE MITIGATION WORK

The STATE Project has a Corps reference number of NWS-2009-22, an Ecology Water Quality Certification Order number of 7448, a Snohomish County Shoreline Substantial Development Permit reference number of 09-104288 SM, and a WDFW Hydraulic Project Approval Number of 115701-1, which make up the STATE Permits, and provide the specific mitigation acreage requirements as set forth in the following Table 1.1. The COUNTY's obligation to perform the Mitigation Work under this Agreement shall consist of the COUNTY's designing and constructing the wetland restoration project commonly known as the Smith Island Restoration Project (the "Smith Island Project"), which is conceptually illustrated in Exhibit A and involves building a new setback dike system and breaching the existing outer dike along Union Slough, and which will allow tidal inundation of the area between the breached dike and the new setback dike system. Additional mitigation requirements for the Mitigation Work, including monitoring, are set forth in the STATE Permits, and are not covered by this Agreement, except as expressly provided herein.

Table 1.1

	Start of Smith Island Restoration Site construction Relative to WSDOT Bridge Project Permit Issuance			
Resource (Impact Type)	Within Five Years		Greater Than Five Years	
	ft ²	Acre	ft ²	acre
Estuarine Wetland (Permanent)	39,384	0.90	78,768	1.81
Estuarine Wetland (Indirect)	5,142	0.12	5,142	0.12
Stream (Indirect)	246	0.01	492	0.01
Buffer (Permanent)	39,852	0.91	39,852	0.91
Total:	84,624	1.94	124,254	2.85

2. PAYMENT AND RECORDS

2.1 The STATE, in consideration of the Mitigation Work to be performed by the COUNTY, agrees to reimburse the COUNTY for the Mitigation Work for design, construction and monitoring as specified herein for the total amount of One Million Dollars (\$1,000,000.00) to be paid by the STATE as follows:

- (a) Advance Payment for Design: Upon the effective date of this Agreement, the COUNTY shall invoice the STATE for an advance payment of one hundred thousand dollars (\$100,000) for all design related to the Mitigation Work, retroactive to the last quarter of 2013. The STATE shall pay the invoice within 30 calendar days after receipt of the invoice.
- (b) Payment During the Construction Phase: Total invoices for the construction phase of the Mitigation Work shall not exceed Nine Hundred Thousand Dollars (\$900,000.00). Since the completion of the Mitigation Work is dependent upon the completion of the overall Smith Island Project, the COUNTY shall submit detailed invoices to the STATE based on the percentage of the overall Smith Island Project completion, PROVIDED, however, that 100% of all payments from the STATE to the COUNTY will be made upon "physical completion" of the Mitigation Work. For example, if the COUNTY decides to invoice the STATE after 20% completion of the Smith Island Project, the amount of the invoice shall be \$180,000 (20% x \$900,000). Invoices shall be sent to the STATE no more than once per month. Upon review and acceptance of the charges, the STATE shall make payment to the COUNTY within 30 calendar days of receipt of the invoice.
- (c) Final Payment: The final invoice submitted to the STATE shall be clearly marked and identified as such. Upon receipt of an invoice from the COUNTY, the balance of the

total sum amount specified above shall be paid by the STATE within 30 calendar days.

2.2 Unless otherwise provided for herein, upon payment of the total sum amount of One Million Dollars (\$1,000,000.00) by the STATE to the COUNTY as described above, the STATE will have fully satisfied its payment obligations to the COUNTY for the Mitigation Work. Accordingly, the COUNTY agrees that the STATE shall not be responsible to reimburse the COUNTY for any additional or future costs incurred by the COUNTY or its consultants or contractors in connection with the Mitigation Work or Smith Island Project.

2.3 Audits/Records: All records for the Mitigation Work in support of all costs incurred shall be maintained by the COUNTY for a period of three (3) years after this Agreement is terminated pursuant to Section 14 of this Agreement unless otherwise required by law. The STATE shall have full access to and the right to examine said records during normal business hours and as often as it deems necessary. The Parties agree that the Mitigation Work performed herein is subject to audit by either or both Parties and/or their designated representatives, and/or state of Washington and/or the federal government, including the Regulatory Agencies.

3. CONSERVATION INSTRUMENT

The COUNTY shall protect the Mitigation Work on the site created by means of a Conservation Instrument, pursuant to Section 4.6, encumbering a certain portion of the Smith Island Project site, as shown on Exhibit A. The portion of the Smith Island Project site that identifies the encumbered property is referred to as the "STATE's Mitigation Site" for the purposes of this Agreement.

4. IMPLEMENTATION AND CONSTRUCTION OF SMITH ISLAND PROJECT INCLUDING THE MITIGATION WORK

4.1 Schedule

The COUNTY anticipates implementing the Smith Island Project according to the timeline set forth below. However, the Parties understand and agree that this timeline is an estimate only, and that delays in the commencement and/or completion of various phases of Smith Island Project implementation may occur:

Project Activity and Performance Objective	Estimated Completion Date
SEPA document issued	December 2013

Final Design and Permitting Completed	July 2014
All Funding Secured for Project Construction	July 2014
Construction Contract Awarded	July 2014
Complete New Dike Construction	September 2015
Complete Interior Restoration & Breaching of Existing Dike	October 2015
Maintenance & Success Monitoring of Restored areas, Adjusting as Needed (five years)	October 2015 – October 2020

The COUNTY shall not be liable to STATE as a result of any delays in the implementation and/or construction of the Smith Island Project.

4.2 To insure that the design of Mitigation Work meets the “STATE Permits” mitigation requirements, the COUNTY shall submit the design plans for STATE’s review prior to construction of the Mitigation Work. The COUNTY will cooperate with the STATE on incorporating the STATE’s comments into the design to the extent practicable.

4.3 Right to Amend or Alter Design of Smith Island Project:

The COUNTY shall have the right, in its sole discretion, at any time or from time to time, to reasonably amend or alter the design of the Smith Island Project from the design described in this Agreement; provided that, as conceptually illustrated in Exhibit A, the design of the Smith Island Project builds a new setback dike system and breaches the existing outer dike along Union Slough to tidally inundate the area between the breached dike and the new setback dike system.

4.4 Cooperation with Regulatory Agencies:

In constructing and implementing the Smith Island Project, the COUNTY agrees to fully cooperate with the Regulatory Agencies in order for the STATE to receive concurrence from the Regulatory Agencies that the Smith Island Project satisfies the mitigation needs of the STATE Project. By way of example, and not by way of limitation, the COUNTY shall provide the Regulatory Agencies with reasonable access to the Smith Island Project site for purposes of inspection. In addition, the COUNTY shall also provide authorized representatives of the STATE with reasonable access to the Smith Island Project site as necessary for the purposes of this Agreement.

4.5 Substantial Completion:

For purposes of this Agreement, construction of the Smith Island Project shall be deemed "substantially complete" when all of the following have occurred: (i) the new set-back dike has been constructed; (ii) interior improvements have been constructed; (iii) the old dike has been breached; (iv) tidal inundation has been achieved; and (v) the COUNTY has delivered written notice to STATE stating that construction of the Smith Island Project is substantially complete.

4.6 Recordation of Conservation Instrument:

As soon as reasonably possible after substantial completion of the Smith Island Project, the COUNTY shall record a site protection mechanism that is acceptable to the Regulatory Agencies, such as a conservation easement, restrictive covenant, or similar servitude (the "Conservation Instrument"), which shall permanently encumber the STATE's Mitigation Site as shown on Exhibit A for the benefit of STATE as mitigation for the STATE Project. The STATE shall draft the instrument in a form acceptable to the COUNTY and shall be responsible for ensuring that it is acceptable to the Regulatory Agencies for the STATE Permits. The Conservation Instrument shall be in a form mutually agreed upon by the COUNTY and the STATE. The COUNTY agrees to draft and include a legal description of the STATE's Mitigation Site in the Conservation Instrument.

4.7 Amount of Acreage Constituting STATE's Mitigation Site:

The amount of acreage of the Smith Island Project Site that shall constitute the STATE's Mitigation Site shall be determined as set forth below.

- (a) If substantial completion of the Smith Island Project occurs within five (5) years of the last date of the issuance of the STATE Permits, the Conservation Instrument shall, in connection with this Agreement, encumber 1.94 acres of the Smith Island Project Site; or
- (b) If substantial completion of the Smith Island Project occurs more than five (5) years after the last date of the issuance of the STATE Permits, the Conservation Instrument shall encumber 2.85 acres of the Smith Island Project Site.

4.8 Location of STATE's Mitigation Site:

The STATE's Mitigation Site shall be located within the area shown as being designated for mitigation purposes on Exhibit A of this Agreement. The exact location of the real property that will become the STATE's Mitigation Site shall be determined by the COUNTY in its reasonable discretion. The STATE's Mitigation Site shall be as close to Union Slough as reasonably possible, and it shall be at least 110 feet away from any potential disturbance from maintenance or access needs associated with any improvement. The COUNTY shall be responsible for obtaining an accurate legal description of the STATE's

Mitigation Site prior to recordation of the Conservation Instrument in accordance with Section 4.6.

5. COUNTY RELEASE FROM OBLIGATION IN THE EVENT OF EARLY TERMINATION

If the COUNTY is unable to complete the Mitigation Work for reasons beyond the COUNTY's reasonable control, the COUNTY shall immediately notify the STATE of such circumstances, in writing, after which this Agreement shall terminate upon receipt of the notice. In the event of such early termination of this Agreement, the COUNTY shall keep the advance payment of \$100,000 identified in Section 2.1(a) of this Agreement for design work and shall bill the STATE based on the percentage of construction work completed since the previous invoice. . The STATE shall pay this final invoice within thirty (30) calendar days of receipt of the invoice.

6. MONITORING

The COUNTY agrees to perform monitoring for the entire Smith Island Project, including the STATE's Mitigation Site to the extent that the COUNTY is required to perform monitoring by its own permits, at its own cost. The STATE will independently demonstrate successful achievement of the Mitigation Work in satisfaction of the requirements of the STATE Permits. The COUNTY shall make its monitoring data and reports available to the STATE upon request. Any monitoring and/or reporting required for the STATE's Mitigation Site by the Regulatory Agencies to fulfill the requirements of the STATE Permits that exceed the type or scope of monitoring and/or reporting the COUNTY is required to perform for the entire Smith Island Project shall be the sole responsibility of the STATE.

7. RIGHT OF ENTRY

The COUNTY grants to the STATE and its employees, authorized agents and contractors, to include subcontractors, a right of entry, privilege and permit of ingress and egress over, under, upon and across the Smith Island Project and the STATE's Mitigation Site shown on Exhibit A, for the purpose of inspection, monitoring and remedial work.

8. DELIVERY OF MITIGATION WORK AND ACCEPTANCE

8.1 When the COUNTY has fulfilled its obligations under Section 4, above, the COUNTY shall notify the STATE in writing that the Mitigation Work is delivered (the "Notice of Delivery"). The Notice of Delivery shall include a copy of the recorded Conservation Instrument. The Notice of Delivery shall constitute the STATE's acceptance that the County has fulfilled its obligations with respect to this Agreement.

8.2 The Parties agree to work together in good faith to modify the Mitigation Work to the extent necessary to comply with the STATE Permits as long as such modification does not interfere with the COUNTY'S performance of its own obligations in conjunction with the Smith Island Project.

9. REMEDIAL ACTION FOR SMITH ISLAND PROJECT

If the STATE's Mitigation Site does not perform as anticipated to provide tidal inundation, the STATE shall discuss with the COUNTY remedial action necessary in order to achieve the tidal inundation. In such event, the COUNTY shall notify the STATE of what remedial action the COUNTY is required to perform to provide tidal inundation. The COUNTY agrees to perform such remedial work at the COUNTY's cost. Any remedial action required of the STATE by the Regulatory Agencies for the STATE Mitigation Site to fulfill the requirements of the STATE Permits for the STATE Project that exceeds the type or scope of remedial work the COUNTY is required to perform to provide tidal inundation for the Smith Island Project site shall be the sole responsibility of the STATE.

10. DISPUTE RESOLUTION

10.1 In the event that a dispute arises under this Agreement, it shall be resolved by the COUNTY's Director of Surface Water Management Division and the STATE's Northwest Region Project Development Engineer. If the dispute cannot be resolved at that level, it shall be referred to the COUNTY Public Works Director and the STATE's Northwest Region Administrator, or their designees, who shall resolve the dispute. The Parties agree that they shall have no right to seek further relief under this Agreement until and unless each of these preliminary steps is exhausted.

10.2 In the event that the preliminary steps set forth in Section 10.1 do not resolve the dispute, the following procedure shall be used: The STATE and the COUNTY shall each appoint a member to a disputes board, these two members shall select a third board member not affiliated with either Party. The three-member board shall conduct a dispute resolution hearing that shall be informal and unrecorded. An attempt at such dispute resolution in compliance with aforesaid process shall be a prerequisite to the filing of any litigation concerning the dispute. The Parties shall equally share in the cost of the third disputes board member; however, each Party shall be responsible for its own costs and fees.

10.3 In the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the Parties agree that any such action or proceedings shall be brought in Thurston County Superior Court or Snohomish County Superior Court. Further, the Parties agree that each will be solely responsible for payment of its own attorneys' fees, witness fees, and costs.

11. LEGAL RELATIONS

11.1 Each of the Parties shall protect, defend, indemnify, and save harmless the other Party, its officers, officials, employees, and agents, while acting within the scope of their employment as such, from any and all costs, claims, judgment, and/or awards of damages (both to persons and/or property), arising out of, or in any way resulting from each Party's own negligent acts or omissions related to or arising out of its performance under the terms of this Agreement. Neither Party will be required to indemnify, defend, or save harmless the other Party if the claim, suit, or action for injuries, death, or damages (both to persons and/or property) is caused by the sole negligence of the other Party. Where such claims, suits, or actions result from the concurrent negligence of the Parties, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of each Party's own negligence.

11.3 Each Party agrees that its obligations under this Agreement extend to any claim, demand, and/or cause of action brought by, or on behalf of, any of its employees or agents. For this purpose, each Party, by mutual negotiation, hereby waives, with respect to the other Party only, any immunity that would otherwise be available to it against such claims under the Industrial Insurance provisions of Title 51 RCW.

11.2 The indemnification and waiver terms shall survive the termination of this Agreement.

12. EFFECTIVE DATE

This Agreement shall become effective as of the Parties' signature date last written below and shall remain in effect until final Payment by the STATE as specified in this Agreement.

13. TERMINATION

13.1 Neither the STATE nor the COUNTY may terminate this Agreement without the written concurrence of the other Party, except as follows:

If the COUNTY is unable to complete the Mitigation Work for reasons beyond the COUNTY's reasonable control, the COUNTY shall immediately notify the STATE of such circumstances, in writing, after which this Agreement shall terminate upon receipt of the notice and reimbursement of STATE payments as specified under Section 5.

13.2 The following sections shall survive the termination of this Agreement:

Section 2.3
Section 4.3
Section 7

Section 9
Section 10
Section 11
Section 14

14. FORCE MAJEURE

14.1 In the event of substantial damage caused by a natural or human-caused catastrophic event or a deliberate and unlawful act, that the COUNTY and the STATE determine has had a significant adverse impact on the quality of the aquatic functions, native vegetation, soils, or wildlife at the Mitigation Site and is beyond the control of the COUNTY, its agents, contractors, or consultants to prevent or mitigate, the COUNTY shall not be held responsible for re-establishing the Mitigation Site. Any delay or failure of the COUNTY to comply with the terms of this Agreement shall not constitute a noncompliance if and to the extent that such delay or failure is primarily caused by any force majeure or other conditions beyond the reasonable control of the COUNTY, its agents, contractors, or consultants and the failure significantly adversely affects the COUNTY's ability to perform its obligations under this Agreement. Such force majeure events may include natural or human-caused catastrophic events or deliberate and unlawful acts by third parties. A natural catastrophic event includes, but is not limited to, a flood equal to or greater in magnitude than the 100-year flood event, an earthquake of a force projected from an earthquake with a return period of 475 years, drought that is significantly longer than the periodic multi-year drought cycles that are typical of weather patterns in the Pacific Northwest, as well as debilitating disease, wildfire, depredation, regional pest infestation, or fluviogeomorphic change. A human-caused catastrophic event includes, but is not limited to, war, insurrection, riot or other civil disorders, spill of a hazardous or toxic substance, or fire. A deliberate and unlawful act includes, but is not limited to, the dumping of a hazardous or toxic substance, as well as significant acts of vandalism or arson. The COUNTY shall give written notice to the STATE if the performance of the Mitigation Site is affected by any such force majeure event as soon as is reasonably practicable, but in any event no later than sixty (60) days after learning of such condition and performance.

14.2 If any such event occurs, the COUNTY, in consultation with the STATE, will determine what changes to the Mitigation Site will be in the best interest of the Mitigation Site and the aquatic environment. Under no circumstances shall the consequences of any force majeure events recognized as such by the COUNTY and the STATE require the COUNTY to contribute additional funds or complete additional mitigation related to the permitted STATE Mitigation Work.

15. TRANSFER OR ASSIGNING

No Party to this Agreement shall transfer or assign any right or obligation hereunder without the prior written consent of the other Party.

16. INTERPRETATION

This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the Parties, and the language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the Parties hereto. The captions and headings in this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement. This Agreement shall be construed so that wherever applicable the use of the singular number shall include the plural number, and vice versa, and the use of any gender shall be applicable to all genders.

17. AGENCY CONTACTS:


COUNTY Snohomish County
 Department of Public Works
 Surface Water Management Division
 3000 Rockefeller Avenue, M/S 607
 Everett, WA 98201
 Attention: Debbie Terwilleger, SWM Director
 Phone: 425-388-3464
 Fax: 425-388-6455
 Email: debbie.terwilleger@snoco.org


STATE Washington State Department of Transportation
 15700 Dayton Avenue N.
 Seattle, WA 98133-9710
 Attn: Catherine George, Engineering Manager
 Phone: 206-440-4774
 Fax: 206-440-4806
 Email: georgca@wsdot.wa.gov

IN WITNESS WHEREOF the Parties hereto have executed this Agreement as of the Party's date signed last below.

SNOHOMISH COUNTY

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

By: 
for John Lovick, County Executive

By: 
Michael A. Cotten, P.E.
Assistant Regional Administrator
Snohomish and King County

Date: 5/16/14

Date: 3.6.14

COUNCIL USE ONLY

Approved: 5.14.14
Docfile: D-13

Approved As To Form:

By: 

Martin Rollins

Deputy Prosecuting Attorney

Date: 3/19/14

Approved As To Form:

By: 

Ann E. Salay

Assistant Attorney General

Date: 3-3-14

